BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92

REPLY COMMENTS OF HYPERCUBE TELECOM, LLC ON FURTHER NOTICE OF PROPOSED RULEMAKING

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EXECUTIVE SUMMARY

HyperCube Telecom, LLC, ("HyperCube") submits these Reply Comments addressing initial comments responding to Sections XVII.L-R of the Further Notice of Proposed Rulemaking ("*FNPRM")* in the USF/ICC Transformation proceeding. As a general matter, HyperCube recommends that the Federal Communications Commission (the "Commission" or "FCC") make no further sweeping changes in the intercarrier compensation ("ICC") regime at this time while many open questions remain as to the impact, and even the interpretation, of the *USF/ICC Transformation Order*. Rather, the Commission should focus on matters requiring prompt attention in order to ensure that all consumers can have high quality, reliable voice call transmission services during the transition to an all-Internet Protocol ("IP") infrastructure. These Reply Comments address two of these matters.

In particular, as HyperCube proposed, the Commission should establish a traffic-based standard for mandatory good faith negotiation of direct interconnection arrangements between competitive local exchange carriers and all incumbent local exchange carriers, including those located in rural areas. The four T-1 traffic volume standard proposed by HyperCube could be easily applied by both carriers and state regulators, and it would promote the development of needed competitive traffic routing arrangements without requiring regulatory micromanagement of additional ICC rate elements. It would also promote the IP transition by encouraging intercarrier agreements for traffic transmission, by facilitating completion of IP-originated calls as well as of calls originated in Time Division Multiplexing ("TDM") format, and by fostering a competitive marketplace.

The FCC should refrain from making further changes at this time to originating access ICC while the market is still adjusting to the fundamental ICC changes effected by the *Order*.

Analysis of their impact is far from complete and is complicated by questions raised by differing interpretations of the *Order*, such as those raised with respect to Voice over Internet Protocol - TDM ICC. Not only are marketplace forces such as vertical integration and intercarrier agreements already limiting the effect of originating access, but also additional immediate reductions in originating access ICC would place increased pressure on the Connect America Fund and Access Recovery Charge recovery mechanisms, and they would favor large, vertically-integrated carriers over smaller providers to the detriment of a competitive marketplace. Nor are any changes required at this time with respect to the ICC regime for 8YY traffic, which compensates originating carriers for use of their networks in the provision of 8YY service to businesses that are not the customers of the originating carriers.

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REPLY COMMENTS OF HYPERCUBE TELECOM, LLC
ON FURTHER NOTICE OF PROPOSED RULEMAKING

HyperCube Telecom, LLC ("HyperCube"), [1] by its attorneys, submits these Reply Comments in response to certain initial comments by other parties addressing intercarrier compensation ("ICC") issues raised in Sections XVII.L-R of the *Further Notice of Proposed Rulemaking* ("*FNPRM*") issued by the Federal Communications Commission (the "Commission" or "FCC") in the above-captioned docket.[2]

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[1] HyperCube, LLC, headquartered in Lancaster, Texas, became a wholly-owned indirect subsidiary of West Corporation, a leading provider of technology-driven voice and data solutions headquartered in Omaha, Nebraska, on March 23, 2012. *See Consummation Notices*, filed March 28, 2012 (WC Dkt. 11-198; File No. ITC-T/C-20111201-00363).

[2] *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (Nov. 18, 2011) ("*Order*" or "*FNPRM*," as applicable). All references to comments and to *ex parte* submissions are to filings in the above-referenced FCC proceeding unless otherwise indicated.

I. Introduction

As a general matter, because there has been little time for analysis of the impact of the major ICC changes effected by the *Order*, the Commission should resist invitations to make further far-reaching changes to the ICC system pursuant to the *FNPRM* now. Rather, given the Commission's commitment to an Open Internet [3] and the FCC's reluctance to address jurisdictional issues related to various types of Voice over Internet Protocol ("VoIP") traffic,[4] the Commission should focus its immediate attention only on measures that promote transparent transmission of voice traffic [5] during the transition to an all-Internet Protocol ("IP")

[3] *See Preserving the Open Internet*, Report and Order, 25 FCC Rcd. 17905 (2010); 47 C.F.R. § 8.1 ("The purpose of this Part is to preserve the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission."). The Part 8 rules require transparency and prohibit blocking and unreasonable discrimination. 47 C.F.R. §§ 8.3, 8.5, 8.7. *See* Comments of Comcast Corporation (filed Feb. 24, 2012) ("Comcast Comments") at 28-30, 34-38 (discussing absence of regulation and operation of the Internet).

[4] *See Order* at ¶954 (Commission has not classified interconnected VoIP services or similar one-way services as "telecommunications services" or "information services") (footnotes omitted); ¶959 n.1967 ("[N]othing in this Order alters the *status quo* with respect to the jurisdictional treatment of VoIP traffic or services under existing precedent.").

[5] Given the current mixed Internet protocol ("IP") and Time Division Multiplexing ("TDM") environment, and the substantial differences between IP traffic exchanges for most VoIP calls and other Internet traffic exchanges, it would be premature for the Commission to focus, as urged by Sprint, Verizon, and AT&T, on broadly applying public Internet policies to voice services merely because they use the Internet protocol. *See* Comments of Sprint Nextel (filed Feb. 24, 2012) ("Sprint Comments") at 16-25; Comments of Verizon (filed Feb. 24, 2012) ("Verizon Comments") at 9-24; Comments of AT&T (filed Feb. 24, 2012) ("AT&T Comments") at 9-27; *but see,* AT&T Comments at 9 (acknowledging that "issues relating to the *transition* to an all-IP world likely will require the Commission's active involvement on a range of issues involving the PSTN.") (emphasis in original). Other parties stressed the differences between the public Internet and the use of IP for voice services. *See* Comments of Time Warner Cable Inc. (filed Feb. 24, 2012) ("TW Comments") at 11-12 ("the only service at issue in this context is the facilities-based exchange of regulated PSTN traffic (either wholesale or retail, depending on the competitive LEC involved). Notably, a LEC's use of Session Initiation Protocol to exchange voice traffic relies on entirely different network facilities than an Internet service provider's exchange of Internet traffic. Voice call routing and transmission also involves a variety of complex procedures, such as queries to number portability, 911, and routing databases, that do not apply to Internet traffic."); Comments of XO Communications, LLC (filed Feb. 24, 2012) ("XO Comments") at 2, 11 (IP interconnection arrangements for voice traffic unrelated to peering arrangements and do not comingle voice traffic with peering-exchanged Internet traffic); Comments of Cbeyond, *et al.* (filed Feb. 24, 2012)
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infrastructure.[6] As shown in HyperCube's initial Comments,[7] and as confirmed by the record responding to the *FNPRM*, two issues raised in HyperCube's Comments warrant immediate clarification so that all consumers can continue to receive high-quality, reliable voice service during the IP transition.

First, the Commission should establish a traffic-based standard for application by carriers and state regulators when competitive local exchange carriers ("CLECs") such as HyperCube request direct interconnection arrangements with any incumbent local exchange carrier ("ILEC"), including those serving rural areas (rural local exchange carriers, or "RLECs").[8] Second, the Commission should make no further changes to ICC for originating access, including 8YY traffic origination, at this time.

II. There Is a Need for an FCC Standard for States and Carriers to Apply in Addressing Requests for Direct Interconnection.

A. The Proposed Standard Is Four T-1s of Traffic to Exchange.

In its initial Comments on the *FNPRM*, HyperCube, *inter alia*,[9] urged the Commission to establish a traffic volume-based *prima facie* standard[10] for states and carriers to apply in addressing good faith requests from CLECs such as HyperCube for negotiation of direct

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("Cbeyond Comments") at 27-28 (exchange of facilities-based VoIP traffic distinguishable from "best-efforts" Internet peering arrangements); Comments of Coalition for Rational Universal Service and Intercarrier Reform (filed Feb. 24, 2012) ("Coalition Comments") at 8-11 (explaining differences among various network uses of Internet protocol for different purposes).

[6] *See Order* at ¶49 ("The first performance goal we adopt is to preserve and advance universal availability of voice service."). *Cf.* Comments of Bandwidth.com, Inc. (filed Feb. 24, 2012) ("Bandwidth.com Comments") at 8 (FCC rules should focus on interconnected VoIP and voice services).

[7] Comments of HyperCube Telecom, LLC (filed Feb. 24, 2012) ("HyperCube Comments").

[8] In the *FNPRM*, the Commission specifically solicited comments on the nature of interconnection arrangements with RLECs, whether they generally involved an indirect interconnection arrangement, and the extent to which negotiated agreements were used. *FNPRM* at ¶1317.

interconnection with RLECs.[11] HyperCube has been frustrated in its efforts to work with rural carriers for their mutual benefit through direct interconnection arrangements that expand traffic distribution options,[12] and HyperCube's proposed bright line test would promote the public

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[9] This proposed direct interconnection standard should be considered in conjunction with HyperCube's support for mandatory indirect interconnection of networks for termination of IP voice traffic. HyperCube Comments at 9.

[10] *Cf.* Comments of Windstream Communications, Inc. (filed Feb. 24, 2012) ("Windstream Comments") at 12 (supporting retention of tariffing to cover such situations as those in which traffic volume does not warrant negotiation of an interconnection agreement).

[11] HyperCube's proposal would not foreclose "state commissions . . . from finding . . . suspensions or modifications to be necessary to avoid economic burden and to serve the public interest, convenience, and necessity from the perspective of their ratepayers" but rather would provide a rule "promulgating standards by which states interpret such requests" and would provide "meaningful interpretive guidance" for states to use in arbitrating interconnection disputes. *See* Comments of National Exchange Carrier Association, Inc. *et al.* (filed Feb. 24, 2012) ("NECA Comments") at 25 n.41 (discussing FCC's jurisdiction to require states to reject suspension and exemption requests).

[12] HyperCube thus disputes Sprint's view that, "Rarely does a competitive carrier have an interest in interconnecting 'within' a rural ILEC network." Sprint Comments at 35**.** In HyperCube's experience, the most efficient network interconnection point may not necessarily be at a network "edge." HyperCube also disputes Sprint's view that changes are needed in Rule 51.709(b) that would reduce Sprint's share of the costs of a direct interconnection facility for TDM interconnection, so that Sprint would bear only half the costs, rather than bearing a share proportionate to its traffic volume. *See* Sprint Comments at 36. In the context of a rural LEC, the rule proposed by Sprint could discourage direct connection arrangements, and these issues are best addressed in the context of intercarrier negotiations, especially in the case of RLECs. Nor should Sprint's proposed 50/50 rule, Sprint Comments at 36–37, be applied to require competitive transport and tandem switching providers such as HyperCube to bear 50% of the costs of a facility disproportionately used by Sprint. *Id.* at 37 n.106**.** Not only do competitive carriers not have (and should not have) mandatory interconnection obligations, but while Sprint may incur no costs to send traffic to its vertically-integrated affiliates, including wireless affiliates, the interconnecting transport and tandem switching services provider does have such costs. Rather, in this scenario, Sprint should be deemed a transport and switching services customer, and it should have to either negotiate rates for these services and interconnection facility cost-sharing or pay the competitive transport and switching services provider's tariffed rates for the services. (Indeed, under the traditional "owner-of-the-traffic pays" approach, IXCs wanting direct connection with LECs build to the LECs for more efficient long distance traffic exchanges, and CLECs build into ILECs for local traffic exchanges. With respect to shared-cost arrangements, one possible negotiated approach (but one that should not be imposed by rule on CLECs) is for each direct interconnection to require two facilities, one in each direction, which each party paying for one such facility. This not only may be seen as financially equitable, but also it ensures diverse paths that promote network reliability and resiliency.)

interest by facilitating the establishment of new, cost-efficient routing arrangements.[13]

In particular, as proposed in HyperCube's initial Comments, the Commission should recognize and establish as a guideline for state regulators the *de facto* industry standard that direct interconnection arrangements are cost-justified and appropriate where the parties have a minimum of four T-1s of traffic to exchange.[14] Under this standard, a CLEC demonstrating that it has four T-1s of traffic to exchange would be deemed to have made a *bona fide* request for direct interconnection,[15] and any RLEC seeking to use Section 251(f) to avoid such direct interconnection would have the burden of proof in a state regulatory proceeding[16] to reasonably demonstrate that highly unusual circumstances make such direct interconnection infeasible.

In the past, relying on Section 251(f), RLECs have routinely rejected HyperCube's requests for direct interconnection even when HyperCube had a substantial volume of traffic to

[13] *Cf. Order* at ¶707 n.1194 ("Competitive LECs, CMRS carriers, and rural LECs, who would otherwise have no efficient means of connecting their networks, often rely upon transit service from incumbent LECs to facilitate indirect interconnection with each other."); T-Mobile USA, Inc. Comments (filed Feb. 24, 2012) at 12 (CMRS provider typically relies on facilities of RBOC or other non-rural LEC to deliver traffic to RLEC meet-points).

[14] HyperCube Comments at ii, 4. The record indicates that in some cases indirect interconnection has been unavailable for traffic volumes exceeding one DS1. Comments of Charter Communications, Inc. (filed Feb. 24, 2012) ("Charter Comments") at 12 n.40; Coalition Comments at 7 ("Most current ILEC interconnection agreements allow local-traffic transit to any one carrier to be capped at the level of one DS1's worth of traffic (about 300,000 minutes/month), though this has not been strictly enforced in recent years.").

[15] HyperCube's proposal thus addresses concerns of RLECs that they should not be burdened with uneconomic interconnection requests. *See, e.g.*, NECA Comments at 29 ("Tariffs are also needed in instances where it would be infeasible for small companies to negotiate with numerous service providers who individually terminate comparatively small amounts of traffic in a particular carrier's territory, but who collectively impose terminating traffic loads that are significant to a small company's network.").

[16] *See Order* at ¶34 ("states will have a key role . . . in evaluating interconnection agreements negotiated or arbitrated under the framework in sections 251 and 252 of the Communications Act.").

exchange – even as much as three DS-3s of traffic at peak periods.[17] As noted in HyperCube's Comments, the courts and the Commission have recognized the Commission's authority to establish Section 251(c) and (f) standards for states to apply.[18] To date, however, neither carriers nor state regulators have had any guidance from the Commission in determining when Section 251(f) should be applied as a bar to direct interconnection. In essence the exception of section 251(f) has been treated as an absolute bar, based on generalized claims of "hardship," without any examination of the particular facts presented.

B. The Proposal Has Significant Competitive Benefits.

As a provider of wholesale competitive local and national tandem switching and transport services, HyperCube offers platform-agnostic services that are critical to the efficient, transparent delivery of calls between all types of service providers, regardless of whether they use IP or Time Division Multiplexing ("TDM") architectures.[19] These services play an important role in assuring a smooth transition to a nationwide all-IP broadband infrastructure, allowing ubiquitous delivery of calls, regardless of the platforms on which they originate. In its initial Comments, HyperCube demonstrated that the public interest would be served by the

[17] Other parties, such as Time Warner, have also found it difficult to negotiate interconnection arrangements with some RLECs. TW Comments at 14.

[18] HyperCube Comments at 5 n.13 (citing *Order* at ¶824 ("we may adopt specific, binding prophylactic rules that give content to, among other things, the 'public interest, convenience, and necessity' standard that governs states' exercise of section 251(f)(2) authority to act on suspension/modification petitions."); 47 U.S.C. § 251(f)(2)(B)).

[19] Expansion of competitive media conversion and transport and tandem switching services such as those offered by HyperCube and others to more markets through additional direct interconnection arrangements, for example, provides more competitive options for IP-format service providers not wishing to invest in their own TDM facilities. *See* XO Comments at 1, 9; Comments of YMax Communications Corp. (filed Feb. 24, 2012) at 6-7. It also avoids the need for premature conversion of ILEC networks to IP. *See, e.g.*, Windstream Comments at 16-17 (becomes economical for a provider to convert to IP when preponderance of voice traffic is VoIP).

Commission's adoption of HyperCube's proposed standard for good faith negotiation of direct interconnection arrangements. Among other benefits, implementation of the standard would be cost-efficient for carriers,[20] would promote network diversity and resiliency,[21] would promote a competitive marketplace,[22] and would avoid the need for micromanagement of other transport rate elements.[23]

In initial comments in response to the *FNPRM* a number of parties expressed concern about the limited options for traffic delivery and the lack of competition for high-priced transit services offered by large price cap carriers. For example, diverse carriers such as Time Warner, XO, and MetroPCS found existing competitive transit options insufficient.[24] ILECs have

[20] HyperCube Comments at 6. *See* Comments of Leap Wireless International, Inc. and Cricket Communications, Inc. at 7 ("Cricket must maintain transit arrangements with the ILEC (even in markets where there are competitive alternatives) in order to terminate all of its traffic").

[21] *See Order* at ¶707 n.1194 (describing reliance of RLECs, CLECs, and CMRS providers on ILEC transit services for network interconnection); Comcast Comments at 7-8 (competitive providers' inability to provide ubiquitous termination to end users served by every voice provider in the country, requiring carriers also to rely on ILECs for indirect interconnection arrangements, with service frequently available from only a single ILEC); Comments of National Cable and Telecommunications Association (filed Feb. 24, 2012) at 4.

[22] HyperCube Comments at 4-5. *Cf.* Charter Comments at 3 ("While competition is emerging for transit services in some markets, many mid-sized and small rural markets are served only by the ILEC, and lack any competitive alternatives"). US Telecom has pointed to growing competition in transit services in urban markets. Comments of US Telecom (filed Feb. 24, 2012) ("US Telecom Comments") at 5.

[23] *Id.* at 6; *cf. FNPRM* at ¶1297 (*Order* did not address such rate elements as "dedicated transport, tandem switching and tandem transport in some circumstances, and other charges including dedicated transport signaling, and signaling for tandem switching"). Implementation of HyperCube's proposal, by establishing competition in transit routes, would address calls for the Commission to establish transit and transport rates because "the dearth of competition for such services requires continued regulatory oversight." TW Comments at 4, 21; *see also* Charter Comments at 16-18 (calling for TELRIC-based transit rates because of lack of competition). Carriers such as Level 3 have expressed concerns that regulation of transit services, particularly imposition of TELRIC pricing, could freeze development of competitive markets for transit services. Comments of Level 3 Communications, LLC (filed Feb. 24, 2012) ("Level 3 Comments") at 2.

[24] *See*, *e.g.*, TW Comments at 4 (dearth of competitive transport and transit services); XO Comments at 6-7 (limited availability of competitive transit services in many areas); Comments of MetroPCS
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expressed similar concerns.[25] HyperCube's proposal represents an effective means of addressing these concerns that is essentially self-effectuating and minimizes the need for regulation.[26] By focusing on identifying operational synergies rather than rate restrictions, the proposal is forward-looking and promotes the public interest in an optimized network infrastructure.[27] The proposal also avoids concerns about forcing premature network upgrades on rural carriers that may be resource-constrained.[28]

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Communications, Inc. (filed Feb. 24, 2012) at 7 (expressing concern that rural carriers lack incentives to engage in bilateral interconnection discussions).

[25] Windstream Comments at 8-9 (ILECs such as Windstream must generally rely on RBOC transit services as RBOCs essentially control the transit market and often refuse to negotiate transit rates and discriminate in pricing in favor of their affiliates). *See also Order* at ¶845; *FNPRM* at ¶1324 n.2399 ((quoting Rural Associations Section XV Comments at 30) ("'Small carriers often have difficulty convincing other carriers to negotiate interconnection agreements with them, particularly where those other carriers can easily terminate their traffic via a transit or tandem provider and thus have no direct contact with the terminating rural carrier at all. In such circumstances, sending carriers are increasingly arguing that because there is no interconnection agreement, they can pay the terminating rural carrier whatever rate they deem appropriate, if anything at all.'")); NECA Comments at 29 ("small companies often find themselves without the resources or leverage to negotiate fair interconnection agreements with larger carriers, who typically refuse to consider reasonable modifications to standard agreements."), and 41 ("Whereas the larger Tier 1 Internet backbone providers have negotiated settlement-free (*i.e.*, bill-and-keep) peering arrangements with each other, they generally do not offer similar arrangements to smaller carriers. To date, larger carriers have shown minimal interest in negotiating IP interconnection agreements with RLECs or other smaller carriers. Essentially, the perceived attitude is 'you need us much more than we need you,' and critical matters such as interconnection points, middle mile capacity and middle mile prices are often provided on take-it-or-leave-it terms."); Comments of GVNW Consulting, Inc. (filed Feb. 24, 2012) at 4 ("All small carriers need tandems for interconnection. In many areas, there are no alternative choices for tandem providers, resulting in a potential abuse of market power by the tandem provider.").

[26] Thus, AT&T, which has complained of "mileage pumping" and excessive transport costs, states these issues will disappear when IXCs have a choice of competing transit providers. AT&T Comments at 61 n.110.

[27] *See*, *e.g.*, Sprint Comments at 24-25 (indirect and direct connection arrangements necessary so that IP-based carriers will no longer have to maintain TDM facilities).

[28] *See* Comments of CenturyLink (filed Feb. 24, 2012) ("CenturyLink Comments") at 44-45 (discussing factors affecting ILEC migration to IP networks, including the role of indirect IP interconnection arrangements as an alternative to direct IP interconnection); Comments of Frontier Communications Corporation (filed Feb. 24, 2012) ("Frontier Comments") at 11 ("converting from a TDM-based network

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By adopting the direct interconnection standard proposed by HyperCube, the Commission will promote the availability of competitive options for routing traffic to rural and urban areas of the country.[29] This increased choice will eliminate bottlenecks and offer both the network resiliency benefits of diverse call paths and the economic benefits of price and service competition. Implementation of the proposal will also encourage network investment by competitive carriers, who will be able to leverage the efficiency of their advanced networks, and it may promote network investment by rural carriers able to invest savings from reduced call transmission costs to support network enhancements. Such network investment also speeds the transition to the all-broadband network envisioned by the National Broadband Plan.[30]

C. The Proposed Standard Is Easy to Implement and Administer.

The standard proposed by HyperCube for mandatory good faith negotiation of direct interconnection arrangements – four T-1s of traffic – is easy to implement and to administer. Rural LECs would be protected from uneconomic direct connection arrangements, and competitive carriers with substantial traffic would be able to establish efficient traffic exchange

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to an IP network is an expensive proposition that will take some time to accomplish. This is particularly true in the case of a primarily-rural carrier like Frontier for which it is estimated that full conversion to IP would cost in the hundreds of millions of dollars”).

[29] Even US Telecom has been able to point to growing competition only in urban and suburban markets. US Telecom Comments at 5.

[30] Federal Communications Commission, *Connecting America: The National Broadband Plan*, at xi, 3 (rel. Mar. 16, 2010). *See* TW Comments at 10 and n.26 (discussing interconnection’s importance in establishing voice competition and broadband deployment in rural areas) (citing *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act*, *as amended*, Declaratory Ruling, 26 FCC Rcd. 8259, ¶27 (2011); *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd. 3513, ¶¶ 8, 13 (2007)) .

arrangements.[31] The states would have a uniform standard to apply in oversight proceedings, and standard interconnection agreements ("ICAs") could be regulated under existing procedures.[32] At the same time, the option for bilateral negotiated commercial agreements could lead to innovative mutually beneficial arrangements that cover a wide range of services, further advancing the IP transition.

Rather than racing to implement new regulations covering additional rate elements, particularly when the industry is still adjusting to the substantial changes effected by the *USF/ICC Transformation Order*,[33] the Commission should first look to the marketplace for cost-effective solutions. With implementation of HyperCube's proposal for traffic-based mandatory direct interconnection (and mandatory indirect interconnection)[34] there will be new competitive options generally available to facilitate efficient, cost-effective interconnection. This approach is also consistent with the Commission's expectation that the industry will increasingly rely on commercial agreements instead of tariffs to govern intercarrier arrangements.[35] In addition,

[31] *Cf.* Comments of Neutral Tandem, Inc. (filed Feb. 24, 2012) at 3 (direct interconnection of networks employed when justified by traffic flows); Level 3 Comments at 3 (transit services provide an efficient option when carriers do not have sufficient traffic for direct connection); AT&T Comments at 56 (intermediate carriers' cost-recovery from sending carriers gives sending carriers efficiency-based incentives for choosing between direct build-out and indirect interconnection arrangements).

[32] *See* HyperCube Comments at 7, 8; 47 U.S.C. § 252(c)(1) (state commissions to arbitrate open issues concerning interconnection and ensure compliance with standards of Section 251 and FCC rules).

[33] *See, e.g.*, Letter from Michael R. Romano, Rural Representatives, to Marlene H. Dortch, Secretary, FCC (Mar. 12, 2012) ("Rural Representatives *Ex Parte*") (supporting position of Frontier and Windstream regarding the need for clarification with respect to the applicability of originating intrastate access charges to all traffic, regardless of whether it terminates in TDM or VoIP format on the distant end; asserting no intent in *Order* to reduce RLEC originating access charges; and detailing potential revenue shortfall from reductions in RLEC originating access charges for calls terminated on VoIP platforms, including substantial shortfalls with respect to 8YY calls).

[34] *See* HyperCube Comments at 9.

[35] The proposal of Bandwidth.com, Inc., that ILECs be required to provide Statements of Generally Available Terms ("SGATs") as templates for interconnection arrangements, as a backstop to optional

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adopting the four T-1 standard requires no FCC or state regulatory micromanagement of rate elements. Rather, it requires only rules setting forth the standard for direct interconnection negotiations, and application of existing procedures by the states to address issues relating to failures to negotiate, opting-in, etc.[36]

HyperCube therefore urges the Commission to clarify Section 251 to provide that a CLEC with at least four T-1s of traffic to exchange is entitled to good faith negotiation of direct interconnection with any ILEC, absent a demonstration by the ILEC in a Section 251(f) proceeding of unusual circumstances that make such interconnection infeasible.

III. The Commission Should Not Further Reform Originating Access Charges, Including 8YY Originating Access Charges, at This Time.

A. It Is Premature to Impose Further Originating Access Charge Reductions.

As HyperCube showed in its initial Comments, the kinds of "access stimulation" concerns that impelled the Commission to impose immediate restrictions with respect to terminating access charges[37] do not exist now with respect to tariffed originating access

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commercial agreements, could complement the HyperCube proposal. *See* Bandwidth.com Comments at 8. Like Bandwidth.com, *id.* at 11, HyperCube has a preference for commercially negotiated agreements.

[36] Thus, for example, the Commission need not adopt proposals such as Windstream's proposal to cap transport rates at $0.0007 (which is not economically supportable), because marketplace alternatives to RBOC transport will be available. *See* Windstream Comments at 3 (justifying its requested rate cap rule on the basis of lack of marketplace options). Similarly, calls by Cbeyond and others for pricing at cost-based rates are misguided and will frustrate the development of competitive options that can continue through the IP transition and beyond. *See* Cbeyond Comments at 13. A competitive marketplace imposes efficient price discipline, and allows the Commission to take a hands-off, or lightly regulated, approach. If rates are artificially capped at insupportable levels, however, no marketplace options will be available, and further market concentration requiring substantial regulation will be inevitable. *See also* AT&T Comments at 7 (market for intermediate services now competitive, but no third party provider could compete with regulated services required to be offered free of charge).

[37] Comptel Comments at 34 (absence of arbitrage rationale for originating access reform).

charges.[38] These charges are already disappearing as a result of vertical integration, and intercarrier agreements, and the transition to IP.[39] Where they remain, they are essential to compensate a carrier for delivering traffic to its customer's selected unaffiliated interexchange carrier ("IXC"),[40] or to the unaffiliated IXC selected to provide 8YY service by a business the customer calls.[41] To the extent that there may be concerns about abuses such as those involving "hang-up" calls by auto-dialers, the filings themselves demonstrate that such practices are violations of the Communications Act that are subject to existing enforcement proceeding remedies.[42] There is no reason to rush to implement new, broadly-applicable restrictions on originating access charges to address aberrant situations already adequately dealt with by existing Commission rules.

Moreover, as indicated by the numerous *ex parte* filings in this docket, many carriers have already raised substantial questions about the appropriate interpretation or application of the

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[38] HyperCube Comments at 14.

[39] *See* Cbeyond Comments at 8 (access charges will become obsolete with IP conversion); Comptel Comments at 34 (absence of arbitrage rationale for originating access reform).

[40] As noted in the Moss Adams Comments, in many cases, even RLECs with affiliated IXCs may have real, not imputed, access charges arrangements with even their affiliated IXCs, which may be resellers, and RLECs are not monopoly providers of long distance services. Comments of Moss Adams LLP (filed Feb. 24, 2012) ("Moss Adams Comments") at 8. *See also* CenturyLink Comments at 10; Cbeyond Comments at 12-13 (few alternatives to RBOC services).

[41] *Cf.* Comments of Nebraska Rural Independent Companies (filed Feb. 24, 2012) at iv ("Originating 8YY traffic constitutes between 20 and 36 percent of originating minutes of use for the companies that comprise NRIC. Pre-subscribed long distance equal access traffic is typically also a significant portion of originating traffic for these companies. Intercarrier compensation or another form of cost recovery for this traffic is necessary and appropriate based upon cost causation principles and the common sense notion that the IXC using a [Rate-of-Return ("ROR")] ETC's network should compensate the ROR ETC for such use."). *See also* Comments of U.S. Telepacific Corp. and Mpower Communications Corp. (filed Feb. 24, 2012) at 4 (potential adverse impact on CLECs of reforms to date because of their limited ability to recoup lost ICC revenues).

[42] *See* Verizon Comments at 5-6 (complaining of harassing autodialing "hang-up" call schemes apparently intended to inflate database dip revenues, but noting Section 227(b) prohibits autodialed calls that must be paid for by the called parties).

Order[43] and its potential adverse impact.[44] Further, the ability of both carriers and the Commission to begin an impact analysis has been hampered by fundamental differences in the interpretation and/or application of the *Order* by multiple affected parties.[45] Given the absence

[43] *See*, *e.g.*, Petition for Reconsideration and/or Clarification of Frontier Communications Corp. and Windstream Communications, Inc., WC Dkts. 10-90 *et al.* (filed Dec. 29, 2011) (seeking application of intrastate ICC rate levels for TDM-VoIP toll traffic); Letter from Kathleen Q. Abernathy, Frontier, to Marlene H. Dortch, Secretary, FCC, WC Dkts. 10-90 *et al.*, (Mar. 8, 2012) (filed jointly on behalf of Cbeyond, EarthLink, Frontier, Integra Telecom, NTCA, tw telecom, and Windstream) ("Joint Letter") (originating intrastate access charges should be available to all VoIP-PSTN traffic on an equal basis and consistent with the treatment of non-VoIP-PSTN traffic, pending final action by the Commission on originating access charges in this proceeding).

[44] *See*, *e.g.*, NECA Comments at 4-6, 31; Cbeyond Comments at 8, n.13 (reduced access charges would create pressure for increased universal service subsidies); Comments of Alaska Communications Systems Group, Inc. (filed Feb. 24, 2012) at 4; Letter from Jennifer K. McKee, NCTA, to Marlene H. Dortch, Secretary, FCC, WC Dkts. 10-90 *et al*. (Mar. 12, 2012) at 1 (calling attention to substantial reductions in originating access charge revenues of cable VoIP providers if capped at interstate levels and stating such revenue reductions would not be offset by cost reductions as are terminating access reductions); *see also* Moss Adams Comments at 21 ("the combination of the reforms adopted in the *Order* and the reforms proposed in the *FNPRM*, would result in the average rural rate-of-return carrier losing money on a pre-tax basis. As a result, these carriers will not be able to continue to invest in and maintain the network, many will be forced into default on their loans, and some will become insolvent."); NECA Comments at 12 (absent matching of originating access charge reductions with cost recovery mechanisms affordable rural rates threatened).

[45] *See* Frontier Comments at 3 (Frontier "cannot yet assess the complete effect that the current ICC reforms will have upon it, particularly at a time when the Commission has also significantly revamped the Universal Service Fund."), at 5 (premature for Frontier to assess appropriate originating access charge recovery amount and implementation "when it remains unclear how the terminating access recovery will be fully implemented."). *Cf.* Letter from Samuel L. Feder, Jenner & Block, to Marlene H. Dortch, Secretary, FCC (Mar. 12, 2012) (questioning Frontier/Windstream *Orde*r interpretation but advocating symmetry in ICC for all VoIP-TDM exchanges). *See* Joint Letter, *supra* n.28; Rural Representatives *Ex Parte*, *supra* n. 33; Letter from Michael D. Saperstein, Jr., Frontier, to Marlene H. Dortch, Secretary, FCC (Mar. 12, 2012) ("Frontier Letter") (substantial revenue impact of any unintended flash-cut to cap intrastate access rates for PSTN-VoIP access traffic at the interstate level; potential for arbitrage that exists when interexchange carriers provide their own Percent VoIP Usage ("PVU") factors, which are difficult to independently verify; and destabilizing effect on a segment of billed traffic as to which no instability previously existed); Letter from Glenn S. Richards, VON Coalition, to Marlene H. Dortch, Secretary, FCC (Mar. 14, 2012) (asserting originating access charges for all VoIP-PSTN traffic subject to interstate rates and not intrastate rates and that VoIP providers, subject to access charges for the first time, will have either to raise rates, and risk losing customers, or find other ways to reduce costs to account for the increased carrier charges); Letter from Matthew A. Brill, Latham & Watkins, to Marlene H. Dortch, Secretary, FCC (Mar. 1, 2012) (opposing Frontier/Windstream Petition; asserting cable VoIP providers also lose revenues as a result of originating access being capped at interstate rates; and advocating symmetrical approach to originating access charges); Letter from Maggie McCready, Verizon, to
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of evidence of pervasive abuse it would be premature for the Commission, particularly in light of the limited opportunity for development of a complete evidentiary record, to impose new originating access charge restrictions at this time. Implementing such restrictions at this time without a more complete understanding of the impact of the changes may increase pressure on support mechanisms such as the Connect America Fund ("CAF") and Access Recovery Charge ("ARC")[46] or may limit the ability of non-vertically integrated independent carriers to receive fair compensation for their services.[47] Such restrictions may also lead to an increasingly concentrated marketplace.

B. Additional Reductions in 8YY Traffic Origination Access Charges Are Unwarranted.

Nor, as HyperCube and others have already shown, is there any reason to impose special restrictions on 8YY originating access at this time.[48] Calling to an 8YY call center is the result

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Marlene H. Dortch, Secretary, FCC (Mar. 6, 2012) (originating access rate for PSTN-VoIP calls capped at interstate level by *Order*).

[46] *Id.* at 2-3. The *Order*'s fifth performance goal "is to minimize the overall burden of universal service contributions on American consumers and businesses." *Order* at ¶57. *See also* Moss Adams Comments (providing information concerning the potential impact of the changes effected by the Order on RLECs and arguing generally in support of delaying further ICC changes pending development of an adequate record for assessing the impact on RLECs of reforms made to date and urging a balance in apportioning support among end users, carriers, and universal service fund payments); CenturyLink Comments at 9-10 (discussing issues raised by substituting end-user charges for ICC revenues). Windstream Comments at 3. Comments of the Independent Telephone & Telecommunications Alliance (filed Feb. 24, 2012) at 2 (defer further action on originating access charge reform to "allow the Commission and industry to adjust to the regulatory and business environment that will result from terminating access reform and allow the Commission to make 'corrections' to address any changes in the environment or unintended consequences of its previous considerable reform efforts. Moreover, it is not feasible to consider reductions in originating access rates at this time if the overall reform plan must operate within (and not exceed) the current $4.5 billion budget for the . . . CAF program.").

[47] Even ILECs with IXC affiliates anticipate substantially reduced revenues if originating access charges are eliminated. *See, e.g.*, Windstream Comments at 4 n.6, 5; Comments of the Indiana Utility Regulatory Commission (filed Feb. 24, 2012) at 7.

[48] *See FNPRM* at ¶1303 (inquiring as to appropriate treatment of 8YY traffic).

of promotion by the offering business of a call center service to the public. 8YY traffic is not stimulated by the pre-selected provider serving a customer who accepts the business's invitation to contact the business. Unless the originating carrier receives access charge revenues from the IXC, the originating access provider is forced to provide a free input to the IXC's 8YY service offering,[49] and this could lead to new cost-recovery charges imposed on consumers as a result of their making purportedly "free" calls.[50]

Contrary to the claims of such parties as The Ad Hoc Telecommunications Users Committee,[51] the customer paying for the 8YY service – the business with the call center – has full control over the volume of calls that use it. If 8YY service is priced by an IXC to cover compensation to unaffiliated pre-subscribed carriers for their role in delivering traffic to the IXC for delivery to a business's call center, the service is priced appropriately.[52] The business has the

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[49] CenturyLink Comments at 8; Comments of the Nebraska Rural Independent Companies (filed Feb. 24, 2012) ("NRIC Comments") at 10-12.

[50] *See* NECA Comments at 13 ("In the universe of 8YY traffic, however, the calling party never shoulders a financial obligation for the call – accordingly, the imposition of *new* obligations on the calling party is unwarranted."). Comments of Comcast Corporation at 6 (extended transition for originating access reform avoids imposing immediate substantial burdens on consumers).

[51] Comments of The Ad Hoc Telecommunications Users Committee (filed Feb. 24, 2012) ("Ad Hoc Comments") at 13.

[52] Treating 8YY traffic under the terminating access rate reduction regime now would have the undesirable effect of shifting costs of 8YY services to consumers (in the form of ARC and CAF contributions) and their pre-subscribed local service providers from the businesses stimulating use of (and thus controlling) the 8YY services and their IXC service suppliers. Further, Ad Hoc's and Time Warner's reliance on rule references to treat 8YY traffic as terminating access is misplaced. *See* Ad Hoc Comments at 12; *see also* TW Comments at 20 and n.5 ("The Commission historically has treated 8YY minutes as terminating minutes," citing Section 47 C.F.R. § 69.105(b)(1)(iii)). The intent of the cited rule, however, was to *increase* revenues for local exchange carriers, by ensuring they could access carrier common line charges on this traffic. *See WATS-Related and Other Amendments of Part 69 of the Comm'n Rules*, Report and Order, 59 Rad. Reg. 2d (P&F) 1418, ¶47 (1986) (adopting 47 C.F.R. § 69.105(b)). The FCC found that "unless originating 800 minutes are . . . treated as 'terminating' minutes . . . 800 Service would be free of any NTS recovery burden." *Id*. Thus, the rate reductions applicable to terminating access charges under the *Order* should not be treated as applicable to 8YY traffic origination, which should be treated at this time for application of rate reductions in the same manner as other traffic origination. To
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option to select another IXC that may offer the business lower prices, perhaps because the IXC has entered into commercial agreements with unaffiliated carriers serving customers the business wishes to attract.[53]

Imposing new access charge restrictions at this time on 8YY traffic origination is contrary to the public interest in maintaining a competitive telecommunications marketplace. There is no need to adopt such restrictions now solely to reduce certain IXC costs that are already on the wane as a result of market developments.

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treat 8YY originating access traffic at this time under the terminating access rate reduction schedule would be directly contrary to the purpose of the cited rule.

[53] Ad Hoc is wrong that treating 8YY origination as originating access "disrupts" the link between customer and payor that provides service price discipline. *See* Ad Hoc Comments at 13 (responding to Commission inquiry in *FNPRM* at ¶1303 ("In the case of 8YY traffic, the role of the originating LEC is more akin to the traditional role of the terminating LEC in that the IXC carrying the 8YY traffic must use the access service of the LEC subscribed to by the calling party. Stated differently, in the case of 8YY traffic, because the calling party chooses the access provider but does not pay for the toll call, it has no incentive to select a provider with lower originating access rates. For this reason, we ask parties to address whether we should distinguish between originating access reform for 8YY traffic and originating access reform more generally.")). The Commission itself had already answered its own question earlier in the *Order* at ¶673. There, the Commission recognized that in the *CLEC Access Charge Case*, "in connection with 8YY calling . . . the Commission noted that it did not appear that the payments would affect calling patterns because the commissions did not create any incentive for those actually placing the calls to artificially inflate their 8YY traffic." (citing *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108, 9142-43, ¶70 (2004)). In the case of 8YY traffic it is the payor, by having the option to select an 8YY service provider that has negotiated lower rates with suppliers of originating access services, who has the opportunity to exercise price discipline. To adopt Ad Hoc's preferred approach, however, would be in effect to allow an 8YY customer to exert pressure on a consumer's choice of its pre-selected local service provider, and likely shift costs to that consumer, so that the 8YY customer and its IXC will have lower costs for a service that is purportedly free to the consumer. Whether or not the average consumer has even heard of access charges is debatable, but there can be no doubt that Ad Hoc members are far more sophisticated in this area and in a far better position than consumers to leverage traffic volumes for rate reductions.

CONCLUSION

For the foregoing reasons, HyperCube urges the Commission to establish a traffic-based standard clarifying that, notwithstanding Section 251(f), in the absence of unique circumstances demonstrating infeasibility, CLECs are entitled to good faith negotiation of direct interconnection agreements with local exchange carriers when the CLEC has a minimum of four T-1s of traffic to exchange with the local exchange carrier. HyperCube also respectfully submits that it is inappropriate for the Commission to impose additional restrictions on originating access charges, including 8YY originating access charges, at this time.

Respectfully submitted,

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